In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

REPLY BRIEF FOR THE PETITIONER

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I.

INTRODUCTION

It is Gurley's position in response to the Brief For the Respondent that a careful analysis of the authorities cited by Respondent in light of a reiteration and discussion of previous authorities cited by Gurley shows that exclusion of federal and state excise taxes from the sales tax base is well founded. A logical analysis and discussion of the points raised by Respondent in the order of their presentation in the Brief For the Respondent indicates that the weight of authority runs contra to the position taken therein by the Respondent.

II.

THE FEDERAL EXCISE TAX IS A TAX UPON THE SALE OF GASOLINE WHICH IS TAXABLE TO THE PURCHASER-CONSUMER THEREOF.

> There is hereby imposed on gasoline *sold* by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon (Emphasis added). 26 U.S.C. § 4081.

The respondent asserts in his brief that the above statutory language places the tax liability upon the producer. To the contrary, petitioner submits that this very language conclusively places the federal tax upon the sale, rather than the producer or retailer. The excise tax, like the state sales tax, does not, and cannot possibly attach until the very moment of the sale. Therefore there can be no sales tax on the excise tax and the excise tax itself must be upon the consumer, rather than the producer or retailer. The legislative intent, as discussed in petitioner's main brief, further substantiates this position.

Petitioner asserts that the practical operation and effect of the statute dictates where the legal incidence of the tax falls; to determine the practical operation and effect this Court should concern itself with substance rather than form.[1]

Petitioner argues that the refunding statutes which provide a return of tax monies to the consumer for non-highway use of gasoline are irrebuttable proof that the legal incidence of the tax is on the person who receives the refund. Nowhere in state or federal tax structures is there found a provision for return of taxes to anyone

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1. *See Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435 (1940); *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276 (1932).

but to the person paying them. Respondent contends that the purpose of the refund provisions is to provide tax relief to the consumer who, he claims, bears only the economic burden of the tax. (respondent's brief pages 18-19). Surely there is no reason to allow the consumer a refund for excise tax on gasoline and deny him a refund for other taxes for which he also bears the economic burden. Such refunds to one other than the taxpayer would not be for a public purpose and thus would render the Federal gasoline tax unconstitutional unless the legal incidence of the tax is deemed to be imposed on the consumer who receives the refund. Statutes should be construed so as to preserve their constitutionality.[2]

It is also significant to note that the Mississippi State Tax Commission admits that the Federal excise tax on diesel fuel is not includable within the gross proceeds of sale for sales tax purposes. (App. 39, 54). The tax on diesel fuel is collected and remitted in exactly the same manner and, as a matter of fact, even on the same forms as the Federal excise tax on gasoline. Thus, the collecting and remitting procedures are exactly the same on diesel fuel as on gasoline and this cannot be considered the determining factor as to the incidence of the tax. (App. 48).

Petitioner, therefore, would submit that all factors involving a determination of the incidence of the Federal excise tax dictate a finding that it is a use tax upon the consumer and should not be included within the gross proceeds of sales for sales tax purposes.

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2. *Savings and Loan Assoc.* v. *Topeka*, 87 U.S. 655 (1875); *Monamotor Oil Co.* v. *Johnson*, 3 F.Supp. 189 (S.D. Iowa, 1933), *aff'd* 292 U.S. 86 (1934).

III.

THE STATE EXCISE TAX IS ALSO UPON THE CONSUMER.

Though the statutory language of the state excise tax differs slightly from its federal counterpart, in substance and effect the statutes are identical. The purpose of both statutes is to provide for a highway building and maintenance fund, which is equitably financed by distributing the costs of highway construction and maintenance to those persons who *use* the highways. The state refund provisions are, in substance and effect, identical to those provided by the federal government. The basic purpose of both federal and state refund provisions is to refund taxes on gasoline not used on the highways. Both provide for refunds to the consumers who are the taxpayers.[3] Respondent has argued that the state excise tax "attaches" when the gasoline is brought into the state[4] and the taxing authority does not care what happens to the gas after the tax has attached.[5]

Regardless of the language of the state statute, the substance and effect of the law is to tax the sale, as is evidenced by the fact that Gurley has twenty to fifty days after his importation of gasoline before the state

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3. As pointed out in petitioner's main brief, to provide refunds to one other than the taxpayer would constitute an abuse of the power to tax. (petitioner's brief pages 32, 42, 43).

4. Respondent makes no similar contention in regard to the federal tax.

5. Respondent cites certain Mississippi Code sections which were amended in 1970 to exclude the provisions stating that the petitioner could "pass the tax on" to include a provision which stated that the tax attaches upon the gasoline's entry into the state. Petitioner would point out that three-fourths of the tax period contested in the case at bar is covered under the unamended statutes which are obviously more favorable to the petitioner's case.

tax becomes due.[6] Since all of Gurley's sales are consummated within seven days of the importation, it is obvious that the state tax is measured by and paid on the number of gallons sold each month. In Gurley's case the tax is not due until after the gasoline has been sold. If Gurley chooses to remove some gasoline from the state, the gasoline is not subject to Mississippi excise tax. If Gurley chooses to merely transport the gasoline from Arkansas through Mississippi to Tennessee, the gasoline (thereby being subject to the Mississippi excise tax according to the language of the statute) is not taxable. (App. 49-52). Obviously, in substance and effect, the Mississippi tax, like the federal tax, "attaches" upon the sale by the petitioner to the ultimate consumer and is, in essence, a use tax upon the consumer of the gasoline.

IV.

THE PREVIOUS DECISIONS OF THE SUPREME COURT OF THE UNITED STATES SUPPORT THE PETITIONER'S POSITION THAT THE FEDERAL AND STATE EXCISE TAXES ARE UPON THE CONSUMER.

Petitioner does not question whether or not the "*Panhandle*[7] economic incidence test" (if ever there was such) was ruled no longer tenable by *King & Boozer*.[8] However, petitioner strongly asserts that the *Panhandle* case placed the legal incidence of the Mississippi excise tax

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6. § 27-55-13 Miss. Code Ann. (1972) requires remittance of the state tax within twenty days of the month following the receipt of the gasoline.

7. *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928).

8. *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941).

on gasoline *squarely* upon the consumer, which was the United States.[9] The Court stated

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the state." 277 U.S. at 222.

Neither *King & Boozer* nor *Kern-Limerick*[10] altered the legal incidence of the Mississippi state excise tax on gasoline; in both cases the legal incidence of the contested taxes was placed squarely upon the purchasers. The controversy in both cases involved the identity of the purchaser. In *King & Boozer* the contractor was the purchaser, and in *Kern-Limerick* it was the United States.[11] (*See* petitioner's main brief pages 39-41).

The Mississippi excise tax on gasoline has not been altered appreciably since the *Panhandle* decision in 1928. Subsequent to *Panhandle* the Mississippi legislature amended the excise law, prefaced by the following: "an act to amend Section 2, Chapter 119, Laws of 1926, changing the manner of determining the excise tax on the *sale*

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9. The Mississippi Supreme Court agreed with this contention,

> "[The United States Supreme] Court held that the state excise tax was on the consumer and since the federal government was the consumer, the state could not collect the tax." *Gurley* v. *Rhoden*, 288 So.2d 868 (Miss. 1974) cited at page 27 of Appendix A to the petition for a writ of certiorari.

10. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954).

11. Contrary to the assertions in the respondent's brief (Pages 9, 21) the *Panhandle* decision does not narrowly define its holding to the legality of the state *sales* tax on sales to the federal government. In fact, this Court ruled upon the incidence of the Mississippi gasoline *excise tax*, and there was no attempt made by the state in *Panhandle* to impose a sales tax on the United States. Obviously respondent's argument, erroneously based on the assertion that a sales tax was involved in *Panhandle*, is not persuasive.

or use of gasoline by persons in motor driven vehicles upon public roads and streets in the state, providing for the granting of permits to distributors and wholesale dealers, requiring reports, fixing penalties and providing for *securing* of the payment of said excise tax." Act of April 26, 1928, Ch. 198 (1928) Gen. Laws of Miss. 266. (Emphasis added). It should be noted that the legislature positively recognized that the tax was upon the *sale or use* of the gasoline by the ultimate consumer under its amended provision. The legislature could have amended this section to specifically state that the burden of the excise tax rested upon the distributor had it desired to achieve this end. It is also obvious that the purpose of this act was to provide an operational procedure for reporting and paying into the state taxes collected from the consumer and providing bond therefor; the purpose obviously was not to tax the distributor. Therefore, this Court's determination in *Panhandle* that the legal incidence of the Mississippi excise tax on gasoline is on the consumer should be conclusive as to the incidence of the Mississippi excise tax in the incident case.

Panhandle is supported by *Indian Motocycle*[12] wherein this Court considered a tax on motorcycles levied as of the time of sale. The Court stated: "the requirement that the tax be paid by 'the manufacturer, producer or importer,' [was] intended to be no more than a comprehensive mode of reaching all first or initial sales, and that it [did] not reflect a purpose to base the tax in any way on manufacture, production or importation." 283 U.S. at 573, 574. It is submitted that the operative language of the federal excise tax and the substance and effect of the state tax are identical to the taxes deter-

12. *Indian Motocycle Co. v. United States*, 283 U.S. 570 (1931).

mined in *Panhandle* and *Indian Motocycle* to be on the consumer.

Respondent has alleged that its position is supported by the case of *Lash's Products Co.* v. *United States*,[13] a half-page opinion involving a manufacturer of soft drinks who failed to make the tax itself a separate item of his bill. The Court stated that since the manufacturer did not adhere to the requirement of a separately stated tax on his bill, he could not contend that the purchaser of his product (who was a wholesaler and not an ultimate consumer of the product) actually paid the tax. It seems that, if the statutory requirements were adhered to in that case, then the tax would be upon the consumer. Petitioner would assert that this brief, limited decision offers this Court little assistance in its determination of the case at bar.

Respondent has also asserted that its position is supported by the case of *Wheeler Lumber Co.* v. *United States*.[14] In that case this Court ruled that the incidence of a tax on transportation was on the person who owned the goods at the time the tax was payable. Since the goods had been shipped FOB place of destination there was no question that the owner of the goods was the lumber company and not the county government, for the county did not take ownership of the lumber until the transportation of the goods had been completed. In fact this Court distinguished *Panhandle* by stating:

> "there is no delivery, and therefore no sale, until after the transportation is completed. Upon these facts, recited in the question, we are of the opinion that

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13. *Lash's Products Co.* v. *United States*, 278 U.S. 175 (1929).

14. *Wheeler Lumber Co.* v. *United States*, 281 U.S. 572 (1930).

the transportation is not a service rendered to the county . . . but is a service rendered to the vendor . . .

The tax is *not laid* on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges . . . It follows that the tax on the transportation cannot be regarded as a tax or a burden on the sale."

"As the tax is not laid on the sale or in any wise measured by it, the case of *Panhandle Oil Co.* v. *Miss.*. . . . is not in point." 281 U.S. at 579.

It is obvious that this Court saw no similarities in the tax on transportation in *Wheeler* and the Mississippi excise tax on gasoline in *Panhandle*. Consequently, it is submitted that neither *Wheeler* nor *Lash's Products* is applicable to the incident case and that *Panhandle* and *Indian Motocycle* are controlling as to the time the excise taxes are imposed and as to legal incidence of both excise taxes.

V.

THE BETTER REASONED LOWER COURT DECISIONS INDICATE THAT THE EXCISE TAX ON GASOLINE IS A USE TAX UPON THE CONSUMER.

The Mississippi State Tax Commissioner makes no attempt in his brief to distinguish the cases favorable to the petitioner.[15] Respondent has, however, quoted exten-

15. Respondent has erroneously stated that the Indiana decision is favorable to the petitioner. (respondent's brief page 95). Respondent apparently refers to the North Dakota decision of *Standard Oil of Indiana* v. *State Tax Commissioner*, 71 N.D. 146, 299 N.W. 447 (1941) discussed in Point I.B. of the petitioner's brief. (pages 28-29). Additionally, respondent erroneously insinuates that only these two states cited on page 25 of its brief have placed the legal incidence of the federal tax upon the consumer. The following cases, all of which are discussed or cited in peti-

(Continued on following page)

sively and in great detail from the decisions of *Martin Oil Service, Inc.* v. *Illinois Department of Revenue*, 49 Ill.2d 260, 273 N.E.2d 823, *cert. denied*, 405 U.S. 923 (1971) and *Ferrara* v. *Director, Division of Taxation*, 2 CCH State Tax Reports, N.J. Para. 200-583 (1973). Gurley would first point out that the *Ferrara* case has been erroneously referred to by respondent as being decided by a "New Jersey Court" (pages 31, 32 respondent's brief) when in reality the decision cited is only an opinion written by an administrative division of the New Jersey Treasury Department, which, it would seem, is the equivalent of an opinion rendered by the Mississippi Tax Commission. Gurley would assert that this "opinion" by the New Jersey administrative agency is not persuasive and should be given no weight whatsoever in the decision of the case at bar.

Moreover, close analysis of the *Ferrara* decision regarding the inclusion of the federal excise tax on gasoline within the base of its unincorporated business tax indicates that this administrative review board establishes no logical reasoning for their decision to include this tax.

It should be noted that the New Jersey review board in justifying its decision that the excise tax is imposed upon the producer not the consumer *misquoted* the appli-

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Footnote Continued—

tioner's main brief (pages 33-35) place the legal incidence of the federal tax upon the consumer: *Tax Review Board of Philadelphia* v. *Esso, Standard Division*, 424 Pa. 355, 227 A.2d 657, *cert. denied*, 389 U.S. 824 (1967); *Gulf Oil Corp.* v. *McGoldrick*, 9 N.Y.S.2d 544 (1939); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938); *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937); *Socony-Vacuum Oil Co.* v. *New York*, 287 N.Y.S. 288 (1936). Petitioner would also point out that the vast majority of the remaining states do not even attempt to levy a sales tax on any part of the sales price of gasoline and that only a select few attempt to levy sales tax upon federal or state excise taxes on gasoline; therefore, there has been no litigation involving the legal incidence of the gasoline excise taxes in those states. *See generally CCH All State Sales Tax Rep.*

cable statute (26 U.S.C. § 4081) in a portion of the opinion as follows:

> "Section 4081 of the federal tax, supra, provides that the tax is 'imposed on gasoline sold *on* the producer or importer thereof' " (Emphasis added).

Thus, the review board, in its enthusiasm, misquoted Section 4081 in order to place the tax *on* the producer, rather than on the gasoline *sold by* the producer. In fact, the New Jersey administrative body based its whole theory of the incidence to the federal excise tax on its misquotation of the federal statute. No other logic or reasoning is espoused for its decision.

The *Martin Oil* decision, and *Agron* v. *Illinois Bell Telephone Company*, 449 F.2d 906 (7th Cir. 1971), relied upon by the Mississippi Tax Commissioner, are both decisions based on the Illinois law. Petitioner would contend that, in light of *American Oil Co.* v. *Mahin*, 49 Ill.2d 199, 273 N.E.2d 818 (1971), the *Agron* case is not relevant to the case at bar. *Agron* is a federal decision interpreting an Illinois law on a communications tax. *American Oil* interprets Illinois law as to the legal incidence of the state excise tax on motor fuel. In that case the Illinois Supreme Court placed the incidence of that tax squarely upon the consumer and specifically stated that the distributor acted only as a collection agent for the state.

The reasoning used by the Illinois court in *Martin Oil* to discount the relevance of refunds to non-highway users is based upon unsound logic. The Illinois court stated that the refunds are not refunds in a "technical sense" but rather allowances to certain consumer producers based on a recognition that the economic burden of the gasoline tax falls on the ultimate consumer. As stated hereinabove there are no tax provisions which allow a

tax refund to anyone except the *ultimate taxpayer*. It is much more palatable to believe that since all federal gasoline excise tax funds are earmarked for highway purposes the funds paid in by consumer taxpayers who are not highway users should be refunded to them in order to maintain Congress's state goal of taxing those who receive the benefit of the facilities which are funded by these taxes.

The *Martin* court attempts to further bolster its position by minimizing the opinions of Congressional committees concerning the federal excise tax as being a user tax. An analysis of the legislative history cited in the petitioner's main brief indicates that the Congress through its committees has forthrightly and unequivocally determined that the federal gasoline excise tax is upon the consumer.

Likewise the argument adopted by the Illinois Supreme Court in the *Martin* decision--that operations similarly situated to petitioner Gurley (in which the only sale is to the ultimate consumer) has no relevance in determining the legal incidence of the tax—is not well founded. The language of the statute indicates that in Gurley's case, the federal excise tax attaches at the time of his only sale which is at the retail level. It is plain, it is definite and is unequivocal if the tax attaches at the time of sale, it cannot be built into the sale's price at any point. It cannot be an inclusion which is passed on to the consumer as the tax cannot attach until there is a sale and in the petitioner's case this sale is to the ultimate consumer. There is no conceivable way under the wording of the federal statute or under the substance and effect of the state statute by which producers situated such as the petitioner can "build in" this tax within their sales price.

The respondent has erroneously stated that Gurley offers only one case as authority for the assertion that the producer acts as an agent for the collection of the excise taxes. (respondent's brief page 35). On page 36 of the petitioner's main brief there are cited seven cases which substantiate petitioner's contention. As stated in the petitioner's main brief, it is common for one party to collect and remit a tax imposed on another, particularly when, as here, the class of taxpayers upon whom the tax is legally imposed is very numerous.

In addition to the authorities already cited, Gurley submits the following. In the case of *Standard Oil Co.* v. *Kurtz*, 330 F.2d 178 (8th Cir. 1964) the Court of Appeals for the Eighth Circuit ruled that the legal incidence of the Nebraska excise tax on gasoline was on the consumer and that the dealer was merely acting as agent for collection of the tax. In a well reasoned opinion the court quoted *Burke* v. *Bass*, 123 Neb. 297, 242 N.W. 606 (1932), wherein the Nebraska court stated:

> "The tax is an excise tax upon the use and distribution of gasoline within the state . . . It is not an impost tax. It applies to all motor vehicle fuels used and distributed within the state. For convenience, it is collected as nearly as possible to the source of production, from him who has it in his possession for use, distribution, sale or delivery in the state. . . .
>
> The construction of such a statute must be judged by its necessary effect. . . . The effect of this statute is to tax the use and sale within the state." 242 N.W. at 607.

The federal court thus concluded: "from this language it is evident that (a) the tax is an excise upon the use

of gasoline, and (b) it is collected 'for convenience' from the dealer." 330 F.2d at 182. The court then stated:

> "[W]e find support for our conclusions in the following: *Monamotor Oil Co.* v. *Johnson,* 292 U.S. 86 (1934) (concerning the Iowa statute which had striking similarity to that of Nebraska, with the court concluding that the tax was an excise tax upon the use of fuel for motor vehicles on the highway of the state and 'that the statute properly construed laid no tax whatever upon distributors, but make of them mere collector from users of motor vehicle fuel'); *Texas Co.* v. *Miller,* 165 F.2d 111, 114 (5th Cir. 1947), *cert. denied,* 333 U.S. 880 (1947) (The Texas statute . . .), *Commonwealth* v. *Wallace,* 294 Mass. 31, 200 N.E. 406 (1936) (The Massachusetts statute)." 330 F.2d at 184.

VI.

DETERMINATION BY THE SUPREME COURT OF MISSISSIPPI OF THE LEGAL INCIDENCE OF ITS OWN EXCISE TAX IS NOT BINDING ON THE SUPREME COURT OF THE UNITED STATES WHERE CONSTITUTIONAL RIGHTS ARE INVOLVED.

Respondent states in Point IV of his brief that the Supreme Court of Mississippi has determined the legal incidence of both the federal and Mississippi gasoline excise taxes to fall upon the producer-distributor and that the Supreme Court of the United States should be bound by the Mississippi Supreme Court's determination of the legal incidence of its own excise tax.[16] However, the authorities cited by respondent are not persuasive in support of this proposition.

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16. Respondent makes no contention that this Court is "bound" by the Mississippi Supreme Court's interpretation of federal excise tax on gasoline.

In respondent's brief at page 38 the case of *Alabama* v. *King & Boozer*, *supra*, is quoted for the principle that state supreme courts are the final authority as to the incidence of that state's excise tax. However, *King & Boozer* does not speak to that principle but merely refers to the power of the state court to determine who is responsible under Alabama law for payment to the state of the exaction. In *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, this Court made the following comment about the excerpt from *King & Boozer* quoted at page 38 of respondent's brief:

> "Read literally, one might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign. Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest. The quotation refers, we think, only to the power of the state court to determine who is responsible under its law for payment to the state of the exaction. The formulation of the 'precise question' at the first of the quotation from *King & Boozer* (U.S.) supra page 319, indicates this." 347 U.S. at 121, 122.[17]

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17. *"New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 83 (1946); *United States* v. *Allegheny County*, 322 U.S. 174 (1944); *Union P.R. Co.* v. *Public Service Comm.*, 248 U.S. 67, 69 (1918). *Cf. West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 29 (1951).

This principle covers the question of who is the 'purchaser.' *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 564 (1946); *National Metropolitan Bank* v. *United States*, 323 U.S. 454, 456 (1945); *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1941)." 347 U.S. at 121.

It is obvious from the above quoted passage that this Court is not bound by the Mississippi Supreme Court's interpretation of its gasoline excise tax under the circumstances of this case.[18]

Respondent also cites the case of *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941) as direct authority for the proposition that this Court would be bound by the state supreme court's determination of the incidence of its own excise tax and reference is made to *United States* v. *Sharp*, 302 F.Supp. 668 (S.D. Miss. 1969), which merely refers to the *Bismarck* decision. However, it should be pointed out that the legal incidence of the North Dakota sales tax was not at issue in *Bismarck*, since the State Tax Commission of North Dakota conceded the point that the North Dakota statute made the purchaser liable for the sales tax. Accordingly, since this Court in *Bismarck* held that the Federal Land Bank, as the purchaser of certain building materials subject to sales tax was constitutionally immune from state taxation on activities in furtherance of the lending functions of the Federal Land Bank, this Court merely stated that it would follow the determinations of the incidence of the sales tax by the North Dakota Supreme Court.

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18. Perhaps the most persuasive indication of the inability of the Mississippi Supreme Court to bind this Court is the very fact that the state court did not feel "bound" by either its prior determination of legal incidence of the state excise or by this Court's determination in *Panhandle*.

In 1947 the Mississippi Supreme Court, basing its decision on the statutory refund provisions and on the logic espoused in *Panhandle*, held in *State* v. *Republic Oil Co.*, 202 Miss. 688, 32 So.2d 290 (1947), that:

> "The . . . tax is not upon the appellee [a distributor] or other distributors either at wholesale or retail, but is upon the ultimate consumer; is a use tax for the use of the public highways by the consumer and is not to be collected for uses other than upon the public highways." *Id.* at 692, 32 So.2d at 294. [Emphasis added].

Respondent concedes that where the question of federal immunity is involved that federal courts may examine the taxing schemes of a state to determine the operating incidence of the tax. A quotation allegedly from *Society for Savings* v. *Bowers*,[19] 349 U.S. 143 (1955) is cited at page 38 of respondent's brief to support this statement. *Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339 (1968) is also cited by respondent. It is submitted by petitioner Gurley that an examination of the *Bowers* and the *Agricultural National Bank* cases shows that where any federal or constitutional right is concerned that the United States Supreme Court will not be bound by the characterization given to a state tax by state courts or legislatures or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal or constitutional right asserted. Obviously as pointed out by respondent in its quotation from *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965) the state court determination must be given weight, but the Supreme Court of the United States may make its own reasonable interpretation of the state statute where constitutional rights are asserted.

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19. The quotation which respondent cites does not appear within the *Bowers* decision. In fact, the *Bowers* case appears favorable to petitioner's contention that this Court is not bound by the lower court's decision. In *Bowers*, this Court stated:

> "The Ohio court, however, has held that this tax is imposed on the depositors. But that does not end the matter for us. We must judge the true nature of this tax in terms of the rights and liabilities which the statute, as construed, creates. In assessing the validity of the tax under federal law, we are not bound by the state's conclusion that the tax is imposed on the depositors, even though we would be bound by the state court's decision as to what rights and liabilities this statute establishes under state law. The court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax. 'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.'" 349 U.S. at 151.

Petitioner Gurley submits that the applicable principle here is that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.[20]

The Mississippi Tax Commissioner has not chosen to rebut petitioner's contention that a tax on one person's property or income by reference to the property or income of another is unconstitutional. Instead, respondent has stated that the authority (*Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931)) cited is not factually comparable to the incident case. In response to respondent's statement, petitioner submits that this Court, in ruling upon *Hoeper*, cited the case of *Knowlton* v. *Moore*, 178 U.S. 41, 77 (1900) wherein the Court stated:

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The *Hoeper* Court then stated:

> "We have no doubt that, *because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law*

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20. *Richfield Oil Corp.* v. *State Board of Eq.*, 329 U.S. 69 (1946). *See also Napue* v. *Illinois*, 360 U.S. 264 (1959); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

as guaranteed by the Fourteenth Amendment." (Emphasis added). 284 U.S. at 215.

VII

CONCLUSION

Petitioner asserts that the legislative purpose in passage of both contested excise taxes is the strongest indication that the incidence of the taxes is upon the consumer. Both Congress and the Mississippi legislature needed a source of revenue for construction of highways. It was only equitable that they distribute the cost of construction in direct proportion to those who use the highways. Since it was burdensome, if not impossible, to establish a system of direct collection from the real taxpayer—the highway user—they, instead, implemented systems for collection from the user by the distributor and remittance by said distributor to the respective government. As previously discussed, if the legislatures had sought to tax the distributors for the privilege of doing business, then they would have taxed each distributor in the distribution system. This obviously was not the purpose or effect of the statutes.

That the actual purpose of the statute is to tax the consumer is further evidenced by the refund provisions of both the federal and state statutes, which provide refunds to the *actual taxpayer* for loss or non-highway use of gasoline. Consequently, for Mississippi to impose upon a distributor a sales tax upon the federal and state excise taxes is clearly unconstitutional, and the judgment of the Supreme Court of Mississippi should be reversed. The reversal of the Mississippi decision would obviously result in a decrease in the cost of gasoline in Mississippi and in all those states which presently impose a sales tax upon the federal excise tax.

Petitioner also submits that the two excise taxes are imposed upon the sale of gasoline and as such these taxes "attach" to the gasoline simultaneously with the Mississippi sales tax and there can be no sales tax upon the excise taxes. Consequently, for this reason, the Court should reverse the decision of the Supreme Court of Mississippi. A reversal of the Mississippi decision for this reason would result in lower gas prices for all consumers who purchase from Gurley or any other independent dealer who buys gas wholesale and sells to the ultimate consumer. A reversal of the Mississippi decision for any aforementioned reason would obviously allow Gurley a refund of the sales tax he has paid under protest. However, such a decision by this Court would not result in a plethora of litigation by others similarly situated to Gurley for refunds of sales taxes already paid, for the Mississippi statutes require that the burden of the taxes for which a refund is sought must have been borne by the person seeking the refund.

In summary, petitioner urges that this Court examine the practical operation and effect of both the federal and state excise taxes on gasoline. It is submitted that both taxes are user taxes imposed upon the sale of gasoline. It is further submitted that the legal incidence of each tax is on the ultimate consumer and not the distributor. As such, Gurley is merely a collector of each tax; the imposition by the Mississippi Tax Commissioner of sales tax on either excise tax is violative of the Fifth and Fourteenth Amendments of the Constitution of the United States, and in the case of the federal tax such an imposition by Mississippi is violative of the federal government's immunity from taxation.

For these reasons, the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles R. Davis, one of the counsel for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th. day of March, 1975, I served copies of the foregoing Reply Brief for the Petitioner on all parties required to be served, by depositing a copy of said Reply Brief for the Petitioner in the United States Post Office, properly addressed, with first class postage prepaid, to Senator William G. Burgin, Jr. and Mr. Hunter M. Gholson, at Post Office Box 32, Columbus, Mississippi 39701, and to Mr. James H. Haddock, 214 Woolfolk State Office Building, Jackson, Mississippi 39201, Counsel of record for the Respondent.

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